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# DICTA

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# DICTA

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## Volume XXVIII, Number 4, April, 1951

# THE LAW OF LIBEL IN COLORADO

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*of the Denver Bar*

Our Supreme Court has decided thirty-one libel and slander cases and the Court of Appeals nine. Many were reversed for new trials, so the sums finally awarded do not appear in the reports. These decisions, however, indicate that the amount of recovery was very small. In one case it was only one cent.[1]

I have never brought a libel case, but have defended many of them. I always tell a client when he wants to start such a suit, "If you are above criticism start the suit, otherwise forget it."

In Colorado, by its Constitution,[2] "the jury shall determine the law and the fact." So no matter what instructions the court may give, they can be entirely disregarded by the jury, which may pay no more attention to them than they do to many arguments of counsel.

Many years ago the newspapers were not very careful of what they said about people. The proprietor of one of them started a libel suit, but it ended very suddenly. In the 1890's, Tom Patterson, owner of the Rocky Mountain News, sued the Denver Republican, the other morning paper, for libel. Tom O'Donnell, a brilliant and forcible lawyer of the old school, was interrogating the jury, and asked one of them:

"You have no prejudice in this case, I presume?"

Answer: "None at all, Mr. O'Donnell. However, I think that a man who runs a newspaper should be able to take his own medicine."

Amid shouts of laughter, the case blew up.

The libel statute in Colorado is for criminal libel, but it has been construed to apply as well as civil libel.[3] This law reads as follows:[4]

> A libel is a malicious defamation expressed either by printing, or by signs, or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him or her to public hatred, contempt or ridicule. Every person, whether writer or publisher, convicted of this offense, shall be fined in a sum not exceeding five hundred dollars or imprisoned in the penitentiary not exceeding one year. In all prosecutions for a libel the truth thereof may be given in evidence in justification, except libels tending to blacken the memory of the dead or expose the natural defects of the living.

It is a penal statute and must be construed strictly. There-

[1] Byers v. Martin, 2 Colo. 605.
[2] Art. II, Sec. 10.
[3] Republican Publishing Co. v. Mosman, 15 Colo. 399, 408.
[4] COLO. STAT. ANN., c. 48, § 199 (1935).

fore it is essential to bear in mind the following definitions in libel, italicized portions of all quotations being the author's:[5]

*Impeach:* "To bring an accusation against; to impute some fault or defect to; to bring or throw discredit on: to call in question; to challenge."

*Honesty:* "Quality or state of being honest; freedom from fraud."

*Integrity:* "Denotes uprightness or incorruptibility, moral soundness; freedom from corrupting influence or practice, especially strictness in the fulfillment of contracts, the discharge of agencies, trusts and the like; uprightness; rectitude."

*Virtue:* "Moral practice or action, conformity to the standard of right; moral excellence; integrity of character; uprightness of conduct; rectitude; morality."

*Reputation:* "The estimation in which one is held; the character imputed to a person in a community or public; especially good reputation; favorable regard; public esteem; general credit; good name."

*Hatred:* "Strong aversion or detestation coupled with ill-will."

*Contempt:* "The feeling with which one regards that which is esteemed mean, vile or worthless; disdain, scorn."

*Ridicule:* "To laugh at, mockingly or disparagingly. Remarks concerning a subject or a person, designed to excite laughter with a degree of contempt for the subject of the remarks."

*Innuendo:*

> The office of an innuendo in pleading is to explain the defendant's meaning in the language employed, *and also to show how it relates to the plaintiff, when that is not clear on its face.* * * * It is only where the words are not prima facie libelous that an innuendo is necessary.[6]
>
> Defamatory words actionable per se are those which on their face and without the aid of extrinsic proof are recognized as injurious; but if the injurious character of the words appears, not from their face in their usual and natural signification, but only in consequence of extrinsic facts, showing the circumstances under which they were said or the damage which resulted to the defamed party therefrom, they are not libelous per se, and in such cases * * * the words are said to require an innuendo.[7]

*Colloquium:*

> In actions for defamation, the rule is that it *must appear from the complaint* * * * *that the plaintiff is the person defamed.* Where the publication forming the subject matter of the action does not contain any direct reference to the plaintiff, the complaint must, in order to state a cause of action, contain appropriate allegations to show such application.
>
> These allegations, commonly known as the colloquium, appear to have consisted at common law of statements of facts.[8]

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[5] From *Webster's New International Dictionary* unless otherwise indicated.
[6] Republican Publishing Co. v. Miner, 2 Colo. App. 568, 574.
[7] 53 C.J.S. 42.
[8] 33 Am. Jur. 218.

The colloquium shows "the defamatory character of the language used when applied to the plaintiff."[9]

## THE DISTINCTION BETWEEN LIBEL PER SE AND PER QUOD

> Defamatory words may be divided into those that are actionable per se, which on their face and without the aid of extrinsic proof are recognized as injurious, and those which are actionable per quod, *as to which the injurious character appears only in consequence of extrinsic facts.* [10]
>
> Words may be actionable in themselves or per se, or they may be actionable only *on allegation and proof of special damage or per quod.* The distinction is based on a rule of evidence. Words of both classes are actionable on the same grounds and for the same reasons. The noxious quality in both lies in the fact that they are the natural and proximate causes of pecuniary damage to those concerning whom they are maliciously uttered. The difference between them is in the matter of the resulting injury. In the case of words actionable per se their injurious character is a fact of common notoriety, established by the general consent of men, and the court consequently takes judicial notice of it. They necessarily import damage, and therefore in such cases general damages need not be pleaded or proved but are conclusively presumed to result, and special damage need not be shown to sustain the action. Moreover, malice is presumed as a matter of law in such cases. *Words actionable only per quod are those whose injurious effect must be established by due allegation and proof.*[11]
>
> Words may be actionable per se, that is in themselves, or they may be actionable per quod, that is, only on allegation and proof of special damage. * * * In his complaint he has attempted to allege innuendos which are unnecessary, if the words are libelous per se. Words which are libelous per se do not need an innuendo, and conversely, *words which need an innuendo are not libelous per se.*[12]

The very recent *Lininger* case, discussed *infra,* is to the same effect.[13]

## THE COMPLAINT

### *Identification of Plaintiff*

If the plaintiff is named in the offending printing and it comes within the statute, the libel is *per se.* All that is then necessary to state in the complaint are the names of the parties, the article, publication thereof, and the damages asked for. If exemplary damages are also sought, follow Rule 101.

Old code sections 74 and 75 on pleading and evidence in libel have been retained in the Rules. They appear in Appendix B of the Rules of Civil Procedure.[14] The section pertaining to the complaint reads as follows:

> Sec. 2. LIBEL AND SLANDER: HOW PLEADED. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff, of the defamatory matter out of which the cause of

[9] 53 Am. Jur. 247, 248.
[10] 53 C.J.S. 41.
[11] 17 R.C.L., 264.
[12] Knapp v. Post Publishing Co., 111 Colo. 492.
[13] Lininger v. Knight, decided Jan. 15, 1951, 1950-51 CBA Advance Sheet 186 (No. 9 for Jan. 20).
[14] COLO. STAT. ANN. Vol. I, Rules of Civil Procedure. p. 403, §§ 2 and 3.

> action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall establish on the trial that it was so published or spoken.

This section was approved in an early Colorado case in which the plaintiffs were not mentioned in the published article.[15]

The latest Colorado libel case holds, however, that if the publication is not personally applicable to the plaintiff, and can only be identified by innuendo, it becomes libel *per quod.* This is the *Lininger case*[16] in which Charlotte Knight, doing business as Overbrook Knight Klub, brought a libel suit claiming Lininger had filed a petition with the Board of County Commissioners of Jefferson County to cancel the liquor license of the Klub, stating therein that the Klub "is a hide-out for people who want to drink and carry on in a manner objectionable to the established records of this community." The filed petition asked that the mountain area be kept clean and that the nuisance be cancelled. It was signed by thirteen people, and a copy was later published in two newspapers.

The complaint was only based on the petition filed with the county commissioners. Yet the district court, over objection, admitted evidence as to the newspaper publications. The Supreme Court reversed practically every ruling of the district court and on this point stated:

> It is doubtful whether or not plaintiff could maintain this action as set up in her complaint, for the reason that there is nothing in the petition as presented to the County Commissioners, or as published, that is personally applicable to the plaintiff. It is not ascertainable from the petition who is defamed, *and that could be ascertained only by innuendo.* By the petition here presented, if any individual could be said to have been defamed, it could easily have been applicable to some other person or persons besides the plaintiff.
>
> Under these prevailing facts, we find, as a matter of law, and so determine, that the trial court was in error in holding the petition as presented to be libelous per se. We see nothing in the petition that specifically points to plaintiff or would tend to expose her to public hatred or contempt. To *be libelous per se, the petition must contain defamatory words specifically directed at the person claiming injury, which words must, on their face and without the aid of instrinsic proof, be unmistakably recognized as injurious.*
>
> *The Entire Instrument Must Be Pleaded*
>
> The general weight of authority is that in an action for libel or slander the exact language of the defamatory publication must be set out in the complaint, and it is not sufficient to set out the publication in its substance and effect. * * * If a libel is contained in two or more successive letters, and no one of them is complete without the others, all letters must be set out. Likewise, the whole of a libelous article in a newspaper must be produced if the passages alleged to be libelous are not clear, or where the rest of the article would vary the meaning, though if the omitted parts would not vary the meaning, the omission is not fatal. * * * The reason for requiring

[15] Craig v. Pueblo Press Publishing Co., 5 C.A. 212.
[16] *Supra,* note 13.

> the pleader to set forth the alleged defamatory matter with such particularity is twofold. In the first place, whether there is any liability depends on what was said or on what the writing complained of contained and the language employed must be set forth so that the court may properly judge of its sufficiency to impose liability. In the second place, the alleged defamatory matter must be set out in *haec verba* in the complaint in order that the defendant may be advised as to the exact charges which he will be called on to meet * * *[17]

*Each Libel Must Be Separately Pleaded*

Moreover, each libel must be pleaded in a separate count. "No law is better suited than that each publication of a libel is a separate and independent claim, and that each must be pleaded as a separate cause of action."[18] If not so done, a motion to dismiss is in order.

*Special Damages Must Be Pleaded In Libel Per Quod*

Rule 9 (g) provides that "When items of special damage are claimed, they shall be specially stated".

Five Colorado cases discuss special damages. "* * * in cases where the words are not actionable per se, * * * special damages must be alleged and proved to warrant a recovery."[19]

In a later case, plaintiff had been in the insane asylum and was paroled.[20] Later a lunacy commission held him still insane. A newspaper published an article stating that he had been *sent back to the asylum.* The italicized portion was, in fact, false, and an action of libel was filed on the falsity of the statement. Special damages were not pleaded. A demurrer was sustained and the action dismissed. It was held that the statement was not libelous *per se* and that special damages must be alleged. The court cited 25 Cyc. 454, which is as follows:

> When words in themselves not actionable become so by reason of some special damage, occasioned by them, such special damage must be particularly averred in the declaration. *In such case it is necessary that the declaration should set forth precisely in what way the special damage resulted from the publication of the words.* It is not sufficient to allege generally that plaintiff has suffered special damage. The special damages thus alleged must be the natural and probable consequence of the publication.

A case in our Court of Appeals[21] cited with approval a U.S. Supreme Court case, *Pollard v. Lyon,*[22] which holds:

> Special damage is a term which denotes a claim for the natural and proximate consequence of a wrongful act; and it is undoubtedly true that the plaintiff in such a case may recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form, and the allegation is sustained by sufficient evidence; *but the claim must be specifically set forth, in order that the*

[17] 17 R.C.L. 390.
[18] Lininger v. Knight, *supra,* note 13.
[19] Republican Publishing Co. v. Moseman, 15 Colo. 399.
[20] Coulter v. Barnes, 71 Colo. 243.
[21] Bush v. McMann, 12 Colo. App. 504.
[22] 91 U. S. 225, 23 L. ed. 309, 314.

> *defendant may be duly notified of its nature*, and that the court may have the means to determine whether the alleged special damage is the natural and proximate consequence of the defamatory words alleged to have been spoken by the defendant. * * *
> Such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. * * *
> Where the words are not in themselves actionable, * * * special damage must be alleged and proved in order to maintain the action. * * *
> In such case, it is necessary that the declaration should set forth precisely in what way the special damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. * * *
> Doubt upon that subject cannot be entertained; but the special damage must be alleged in the declaration, and proved.

The Colorado case then stated, "A complaint for libel which alleges special damage as a consequence of words apparently harmless in themselves, which fails to explain by facts how the words produced the damage, is not a good complaint."[23]

The *Knapp* case, already cited,[24] settles the matter. "As the complaint contains no allegation of special damages, it is insufficient to state a cause of action on the words as libelous per quod."

Our Supreme Court reversed a judgment for plaintiff which included special damages for loss of use of his car, following a collision because this was not pleaded. The court held:[25]

> Such damage is special and without the averment of the facts from which it is to be inferred, the defendant had no reason to be prepared to meet it. * * * The defendant was entitled to notice and time for preparation, and that is the basis of the rule that special damages must be specifically pleaded. The rule is too well established to require citation of authorities to support it.

Malice, too, must be pleaded by the plaintiff if the libel is *per quod.*

### *Motions to Dismiss*

If the libel is *per quod* and special damages are not pleaded, the complaint, under the Rules, is subject to dismissal for failure to state a claim (the old demurrer).

> The proper method of attacking a complaint which fails to allege special damages, where the alleged defamatory matter is not actionable per se, is a demurrer for failure to state a cause of action.[26]

Also, where the publication is privileged, the complaint may be attacked by motion to dismiss. "Where * * * it appears from the allegations of the complaint that the publication sued on is privileged, a demurrer is the proper method of raising the point."[27]

### *Radio Slander*

Under a recent Colorado statute,[28] no damages can be recov-

[23] *Supra*, note 21.
[24] *Supra*, note 8.
[25] Hunter v. Quaintance, 69 Colo. 30.
[26] 37 C. J. 49.
[27] Morley v. Post, 84 Colo. 41, 48.
[28] COLO. LAWS, c. 257, p. 718 (1947).

ered against the owners or proprietors or employees of radio stations for a broadcast by a third party if the defendant alleges and proves that he exercised due care to prevent the publication or utterance of the broadcast. It also applies to radio statements by candidates or their supporters where by any Federal law or rule censorship of such statements in advance of publication is prohibited.

THE ANSWER

As has been indicated, former code section 75, covering the rules for the pleading and evidence of the libel defendant, has been retained in the new Rules, and appears in Appendix B thereof:[29]

> Sec. 3. . . . In an action for libel or slander the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

*Complete Defenses*

There are three complete defenses to a complaint of libel: privilege, the statute of limitations, and truth.

*Privilege:* Four Colorado cases clearly define privilege. "Publications made in the bona fide discharge of a public or private duty, legal or moral, are privileged."[30]

> It is the occasion of the communication, not the communication itself, that determines its character as to being privileged, either absolute or qualified. * * * In the interest of society at large and public policy, generally, it is good defense to an action for libel or slander, that the publication, or communication, is privileged, either absolute, or qualified. It is a right, or privilege on the one side, and a sacrifice on the other, that every citizen has or must make, for the benefit of the common welfare, and in the interests of organized society.[31]
>
> A communication made bona fide upon any subject matter, in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains incriminatory matter, which, without this privilege would be slanderous and actionable * * * [32]

The fourth Colorado citation is under qualified privilege, *infra*. The texts support the Colorado doctrine of privilege:

> There is no liability for the publication of a defamatory statement which is legally justified.[33]
>
> A privileged communication * * * is one which, except for the occasion on which or the circumstances under which it is made, would be defamatory and actionable.
>
> An absolutely privileged communication is one in respect of which, by reason of the occasion on which, or the matter in reference to which it is made, no remedy can be had in a civil action, however

[29] *Supra*, note 14.
[30] Republican Publishing Co. v. Conroy, 5 C. A. 262.
[31] Hoover v. Jordan, 27 Colo. App. 515.
[32] Melcher v. Beeler, 48 Colo. 233.
[33] 33 Am. Jur. 117.

> hard it may bear upon a person who claims to be injured thereby, and even though it may have been made maliciously.
>
> The class of absolutely privileged communications is narrow and is practically limited to legislative and judicial proceedings and other acts of state, *including communications made in the discharge of a duty under express authority of law*, by or to heads of executive departments of the state * * *. (This is) for the promotion of the public welfare.[34]

*Colorado Statute of Limitations:* "All actions for * * * slanderous words and for libels shall be commenced within one year, next after the cause of action shall accrue, and not afterwards."[35]

*Truth*: That the article or other alleged libel is true, of course, is a complete defense. The facts as to the truth do not have to be pleaded.[36]

*Partial Defenses*

There are five partial defenses to a charge of a libel: qualified privilege, fair comment, mitigation, interest and motive, and retraction to show lack of malice.

*Qualified Privilege:* The Labor Advocate, a trade union paper, published an article labeling union drivers who had gone to work for non-union employers as "traitors," "three of the most despicable characters known to organized labor", and said "that they had sold their manhood, if they ever possessed any, for a few dollars".

The court held this a qualified privileged communication, and the plaintiffs were non-suited for failure to prove malice:[37]

> Nor was the qualifiedly privileged character of the article lost by reason of the language used. True it is that bad taste was shown and less offensive words might have been chosen. * * *
>
> The test appears to be this. Take the facts as they *appeared to the defendant's mind at the time of publication*, are the terms used such as the defendant might have honestly and bona fide employed under the circumstances? If so the judge should stop the case. For if the defendant honestly believed the plaintiffs' conduct to be such as he described it, the mere fact that he used strong words in so describing it is no evidence of malice to go to the jury.

*Fair Comment*: That the matter commented on is in the public interest,[38] or that the plaintiff has a bad character, but the defendant does this at his peril. If he fails to prove the plaintiff's bad character, the damages probably will be greatly enhanced.

*Mitigation:* This is the belief of the defendant that the article was true. The circumstances of publication must be stated.[39]

*Interest and Motive*: That the defendant had no interest in attacking plaintiff, and did so only from public duty.

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[34] 33 Am. Jur. 123, 124.
[35] COLO. STAT. ANN., c. 102, § 2.
[36] Sec. 3 of Appendix B to Rules of Civil Procedure, COLO. STAT. ANN., Vol. I. p. 403, *supra* p. 127, See also Rule 8 (b) as to form of denials.
[37] Bereman v. Power Publishing Co., 93 Colo. 581.
[38] ODGERS, LIBEL AND SLANDER, p. 197, 5th ed.
[39] Republican Publishing Co. v. Miner, 12 Colo. 77; Republican Publishing Co. v. Hosman, 15 Colo. 399; Rocky Mountain News v. Fridborn, 46 Colo. 440; and Wertz v. Lawrence 66 Colo. 55.

*Retraction:* This shows lack of malice, and may cause mitigation of the damages.[40]

PROOF ON TRIAL

If the publication is libelous *per se*, all the plaintiff has to do is to identify himself and the defendant, introduce the article, prove publication by the defendant, and he has a *prima facie* case. Malice of the defendant is presumed.

The following additional testimony is admissible: mental suffering of plaintiff;[41] plaintiff's general social standing and condition in life;[42] and the circulation of defendant if newspaper or magazine. As to the business and financial standing of plaintiff, the authorities are divided.

If the publication is libelous *per quod*, then special damages must be proved as alleged in the complaint. These must be specific items tracing each one to the libel. Malice must be shown; it is not presumed.

The plaintiff *cannot* prove: suffering of his family and friends;[43] what a witness understood the words to mean;[44] a different innuendo;[45] good character, except in rebuttal, since this is presumed; and special damages not alleged.

The defendant must prove the averments of his answer.

A CLASSIC AMONG LIBEL CASES

In closing, I wish to quote the all-time classic in libel, with which most of the older members of the bar are familiar, but which will amuse our younger brethren. This is the case of *Cherry v. Des Moines Leader*.[46] An article as published in the Des Moines paper read as follows:

> "Effie was an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waived frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the danse du ventre and fox trot,—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle."

After seeing plaintiffs in court, and hearing the evidence, the court directed a verdict for the newspaper, and said: "If there ever was a case justifying ridicule and sarcasm—aye, even gross exaggeration—it is the one before us."

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[40] Switzer v. Anthony, 71 Colo. 291.
[41] Republican Publishing Co. v. Mosman, 15 Colo. 399.
[42] Morning Journal v. Duke, 128 Fed. 657.
[43] Stevens v. Snow, 214 Pac. 918 (Cal.).
[44] Republican Publishing Co. v. Miner, 12 Colo. 77, and Farmers' Life v. Wehrle, 63 Colo. 279.
[45] NEWELL, SLANDER AND LIBEL, p. 599 (4th ed.).
[46] 86 N. W. 328 (Iowa).

And then the court well laid down the law of privilege:

> If, from defendant's point of view, strong words seemed to be justified, he is not to be held liable, unless the court can say that what he published was to some extent, at least, inconsistent with the theory of good faith. These rules are well settled, and need no citation of authorities in their support. One who goes upon the stage to exhibit himself to the public, or who gives any kind of a performance to which the public is invited, may be freely criticized. He may be held up to ridicule, and entire freedom of expression is guaranteed dramatic critics, provided they are not actuated by malice or evil purpose in what they write. Fitting strictures, sarcasm, or ridicule, even, may be used, if based on facts, without liability, in the absence of malice or wicked purpose. The comments, however, must be based on truth, or on what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the conduct that is made the subject of criticism. Freedom of discussion is guaranteed by our fundamental law and a long line of judicial decisions. The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications, for which no action will lie without proof of actual malice.

I append hereto a list of the Colorado decisions on libel and slander. All the Colorado citations except the *Lininger* case, are under the old Code.

## COLORADO CASES ON LIBEL AND SLANDER

COURT OF APPEALS (8 libel and 1 slander case)
McKenzie v. The Times, 3 Colo. App. 554. Judgment for defendant reversed.
Republican Publishing Co. v. Miner 3 Colo. App. 568. Judgment for plaintiff affirmed.
Craig v. Pueblo Press, 5 Colo. App. 208. Judgment for defendant reversed.
Republican Publishing Co. v. Conroy, 5 Colo. App. 262. Judgment for plaintiff reversed.
Bush v. McMann, 12 Colo. App. 504. Judgment for defendant reversed.
Evans v. Republican Publishing Co., 20 Colo. App. 281. Judgment for defendant affirmed.
Kobey v. Eddy, 21 Colo. App. 140. Small slander judgment for plaintiff affirmed.
Daniels v. Stock, 21 Colo. App. 651. Judgment for plaintiff affirmed.
Hoover v. Jordan, 27 Colo. App. 515. Judgment for plaintiff for $3,225 reversed.
SUPREME COURT (28 libel and 3 slander cases)
Byers v. Martin, 2 Colo. 605. Judgment for plaintiff for 1 cent affirmed.
Downing v. Brown, 3 Colo. 571. Judgment for defendant reversed.
Republican Publishing Co. v. Miner, 12 Colo. 77. Judgment for plaintiff for $3,000 reversed.
Republican Publishing Co. v. Mosman, 15 Colo. 399. Judgment for plaintiff for $775 reversed.
Willard v. Miller, 19 Colo. 534. Judgment for defendant affirmed.
Hazy v. Woitke, 23 Colo. 556. Judgment for defendant reversed.
Denver Publishing Co. v. Halloway, 34 Colo. 432. Judgment for plaintiff for $5,000 reversed.
Rocky Mt. News v. Fridborn, 46 Colo. 440. Judgment for plaintiff reversed.
Melcher v. Beeler, 48 Colo. 233. Judgment for plaintiff for $1,000 reversed.
Burns v. Republican Publishing Co., 54 Colo. 100. Judgment for defendant reversed.
Meeker v. Post, 55 Colo. 355. Judgment for defendant reversed.
Jackisch v. Quine, 62 Colo. 72. Judgment for defendant reversed.
Farmers Life v. Wehrle, 63 Colo. 279. Judgment for defendant reversed.
Wertz v. Lawrence, 66 Colo. 55. Slander judgment for plaintiff for $1,100 reversed.
La Plant v. Hyman, 66 Colo. 128. Judgment for defendant affirmed.
Wertz v. Lawrence, 69 Colo. 534. Second trial slander judgment for plaintiff for $1,500 affirmed.
Weiss v. Goad, 71 Colo. 154. Judgment for plaintiff for $1,000 reversed.
Coulter v. Barnes, 71 Colo. 243. Judgment for defendant affirmed.
Switzer v. Anthony, 71 Colo. 291. Judgment for defendant reversed.

Morley v. Post, 84 Colo. 41. Judgment for defendant reversed.
Glasson v. Bowen, 84 Colo. 57. Judgment for defendant affirmed.
Radovich v. Douglas, 84 Colo. 149. Judgment for plaintiff affirmed.
Towles v. Meador, 84 Colo. 547. Judgment for defendant reversed.
Walker v. Hunter, 86 Colo. 483. Judgment for defendant reversed.
Leighton v. People. 90 Colo. 106. Conviction of criminal libel reversed.
Bearman v. People, 91 Colo. 486. Conviction of criminal libel affirmed.
Bereman v. Power Publishing Co., 93 Colo. 581. Judgment for defendant affirmed.
Kendall v. Lively, 94 Colo. 483. Slanler judgment for plaintiff for $475 affirmed.
Biggerstaff v. Zimmerman, 108 Colo. 194. Slander judgment for defendant reversed.
Knapp v. Post Publishing Co., 111 Colo. 492. Judgment for defendant affirmed.
Lininger v. Knight, decided Jan. 15, 1951, 1950-51 CBA Advance Sheet 186 (No. 9 for Jan. 20). Judgment for plaintiff reversed.

*Summary*

CIVIL LIBELS:
Judgment for plaintiff affirmed—7
Judgment against plaintiff reversed—10
Judgment for defendant affirmed—7
Judgment against defendant reversed—14
CRIMINAL LIBELS:
Judgment affirmed—1
Judgment reversed—1

# DOUBLE RECOVERY FOR WRONGFUL DEATH BY PUBLIC CARRIER?

FRANCES HICKEY SCHALOW
*Assistant Professor, University of Denver College of Law*

If John Doe departs this life through the negligence of a servant of a public carrier, while that servant is running a locomotive, must Mary Doe, his wife, elect whether to sue under Section one (the penal section) of the Colorado wrongful death statute [1] or under Sections two and three (the compensatory sections) of that statute, or can she recover damages under each section? The general question, it seems, is this: If the factual situation in a wrong-

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Section two: Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured.

Section three: All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 1 of this chapter, and in every such action the jury may give such damages as they deem fair and just, not exceeding five thousand (5,000) dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default.

Morley v. Post, 84 Colo. 41. Judgment for defendant reversed.
Glasson v. Bowen, 84 Colo. 57. Judgment for defendant affirmed.
Radovich v. Douglas, 84 Colo. 149. Judgment for plaintiff affirmed.
Towles v. Meador, 84 Colo. 547. Judgment for defendant reversed.
Walker v. Hunter, 86 Colo. 483. Judgment for defendant reversed.
Leighton v. People. 90 Colo. 106. Conviction of criminal libel reversed.
Bearman v. People, 91 Colo. 486. Conviction of criminal libel affirmed.
Bereman v. Power Publishing Co., 93 Colo. 581. Judgment for defendant affirmed.
Kendall v. Lively, 94 Colo. 483. Slanler judgment for plaintiff for $475 affirmed.
Biggerstaff v. Zimmerman, 108 Colo. 194. Slander judgment for defendant reversed.
Knapp v. Post Publishing Co., 111 Colo. 492. Judgment for defendant affirmed.
Lininger v. Knight, decided Jan. 15, 1951, 1950-51 CBA Advance Sheet 186 (No. 9 for Jan. 20). Judgment for plaintiff reversed.

*Summary*

CIVIL LIBELS:
Judgment for plaintiff affirmed—7
Judgment against plaintiff reversed—10
Judgment for defendant affirmed—7
Judgment against defendant reversed—14
CRIMINAL LIBELS:
Judgment affirmed—1
Judgment reversed—1

# DOUBLE RECOVERY FOR WRONGFUL DEATH BY PUBLIC CARRIER?

FRANCES HICKEY SCHALOW
*Assistant Professor, University of Denver College of Law*

If John Doe departs this life through the negligence of a servant of a public carrier, while that servant is running a locomotive, must Mary Doe, his wife, elect whether to sue under Section one (the penal section) of the Colorado wrongful death statute [1] or under Sections two and three (the compensatory sections) of that statute, or can she recover damages under each section? The general question, it seems, is this: If the factual situation in a wrong-

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ful death action is such that it comes within the purview of each section of the statute, does the plaintiff have but one cause of action, or does he have two?

In the case of *Dood v. Baker*,[2] Judge Gooding, sitting in the District Court for the County of Routt, decided that the plaintiff has two causes of action. On defendant's motion "to dismiss, to elect, and to sever" the court said:

> The question is whether the right of action and remedies under Section 1 and under Sections 2 and 3, respectively, are exclusive and in the alternative or are concurrent and cumulative, when the facts bring plaintiff under both parts.

Judge Gooding held the sections are concurrent and cumulative because: (1) "remedies are cumulative on the face of the law"; and (2) "Where the pleaded facts bring the plaintiff within both parts, the sections are distinguishable only as to the remedies and recoveries." Section one imposes a penalty and Sections two and three provide "something entirely different, compensatory damages."

In *Clasen v. Santa Fe Trails Transportation Company* [3] Federal District Judge William L. Knous required the plaintiff to elect the section under which to proceed, stating that if she obtained judgment thereunder, she could then raise the question as to whether she has a cause of action under the other section also, and if judgment is in favor of the defendant on the elected section, then is the time for the court to decide if the entered judgment is res judicata. The action was settled, however, before trial on the elected section.

## "New Cause of Action" Theory in Colorado

Certain decisions by the Supreme Court of Colorado on our wrongful death statutes are helpful in attempting to answer the question. For example, that court has pointed out that since there was no right of action for damages resulting from wrongful death at common law, the right exists only by virtue of statute,[4] which, by the general rule, must be strictly construed.[5] And, on the wrongful death statutes, Colorado has followed the "new cause of action" theory.[6]

Perhaps most important of the interpretations, for our purposes, is the consistent holding that Sections two and three are compensatory, not penal,[7] and, conversely, that Section one is

[2] Civil Action No. 2725, decided October 18, 1949.
[3] Unreported case No. 2949 in the United States District Court for the District of Colorado (1950).
[4] Hindry v. Holt, 24 Colo. 464, 51 P. 1002 (1897).
[5] Stowell v. People, 104 Colo. 255, 90 P. 2d 520 (1939).
[6] Fish v. Liley, 120 Colo. 156, 208 P. 2d 930 (1949) (compensatory section); Denver & Rio Grande R. Co. v. Frederick, 57 Colo. 90, 213 P. 463 (1914) (penal section).
[7] Moffat v. Tenney, 17 Colo. 189, 30 P. 348 (1892); Hayes v. Williams, 17 Colo. 465, 30 P. 352 (1892); Denver & Rio Grande R. Co. v. Spencer, 25 Colo. 9, 52 P. 211 (1898).

penal, not compensatory.[8] In speaking of the compensatory section, the court has said that it affords compensation only for the pecuniary loss which results to the living party entitled to sue from the death of the deceased.[9] But in speaking of the other section, it has been said that the amount of damages to be assessed thereunder depends "solely upon the degree of culpability of the wrongdoer" and "the fact that recovery may be had under it without any proof whatever of damages conclusively establishes that it is penal." [10]

In the leading case of *Denver & Rio Grande R. Co. v. Frederick*,[11] the court explained the distinction between the sections in substantially the following language: They are essentially and diametrically different in their characters, purposes, and objects. Section one gives a cause of action whether decedent would have had one or not. Section three gives a cause of action only when the person injured would have had such a right had death not ensued. The purpose of Section one is to guard and protect human life against the fatal consequences of the negligence, unskillfulness, or criminal intent of any officer or servant of any common carrier under the circumstances detailed in the statute. The recovery is denominated a forfeiture, and the fact that it goes to the next of kin cannot be said to affect or change the character of the provision. Because Section one is penal, it was held in the *Frederick* case to be erroneous to allow the plaintiffs to prove damages occasioned by the loss of the services and support of their son, since the amount of recovery depends solely on the degree of culpability of the defendant.

In *A. T. & S. F. R. R. Co. v. Farrow*,[12] the court further explained the difference between these sections:

> . . . the legislature discriminates between common carriers and other corporations and individuals. They confine section 1 to the former, while section 2 includes the latter. They desired to impose a different liability upon common carriers from that resting upon all other persons, and chose this way of doing it.

## Suit May Be Brought Under Either Section

In *Fredricks v. Denver Tramway Corp.*,[13] plaintiff was introducing her evidence when the defendant moved she be required to proceed under Section one, "conceded to be penal," or Section two, "conceded to be compensatory." She elected to proceed under Section two, and the action was then dismissed as to the defendants. The dismissal was reversed, the Supreme Court's holding that a common carrier may be sued under "either" section. This,

[8] Denver & Rio Grande R. Co. v. Frederick, *supra*, note 6.
[9] Denver & Rio Grande R. Co. v. Spencer, *supra*, note 7.
[10] Denver & Rio Grande R. Co. v. Frederick, *supra*, note 6.
[11] *Ibid.*
[12] 6 Colo. 498 (1883).
[13] 93 Colo. 539, 27 P. 2d 497 (1933).

it seems, is the closest the Supreme Court of Colorado has come to deciding the point in issue.

The New Mexico court has held there is but one cause of action in the situation in question, and that state's wrongful death provisions are substantially the same as those of Colorado. The statute pertaining to the liability of carriers has been construed to be penal,[14] and it has been held, further, that when one is killed by a common carrier, the wrongful death action is under the penal section only, and there cannot be two sections.[15] The United States Court of Appeals for the Tenth Circuit, in an opinion written by Judge Orie L Phillips, relied on the latter decision in again deciding that the action, in the given situation, is under the penal section only.[16] It should be noted that these decisions are contrary to those of the Colorado court.[17]

The interpretation of the Missouri statutes, again in substance the same as those of Colorado, is that the one section is penal [18] and the other compensatory.[19] In a decision involving the latter section,[20] it was held that the plaintiff could elect the section under which he desires to sue, when the facts fall within both of them, the same construction as our court applied in *Fredricks v. Denver Tramway Corp.*[21] The Missouri court has also held that the plaintiff must pray for the damages allowed by the compensatory section, and a prayer for damages based on the penal section is error,[22] an interpretation similar to that in *Denver & Rio Grande R. Co. v. Frederick.*[23]

The Missouri court has decided the point in issue, saying,

> there was but one cause of action, and the court was correct in telling the jury, if they found for the plaintiff on one count, to find for the defendant on the other, as it would not have been proper for the jury to have found for the plaintiff on both counts and assess damages accordingly.[24]

The reasoning behind this conclusion is explained as follows:

> To constitute a cause of action, there must be two subjects of complaint. But in the present case there is but one injury, one subject-matter of complaint—the killing of plaintiff's husband. There being but one cause of action, there could not be a verdict for causing the death one way, and another verdict for causing the death in a different way.[25]

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[14] Dale v. Atchinson, T. & S. F. R. Co., 57 Kan. 601, 47 P. 521 (1897).
[15] Romero v. Atchison, T. & S. F. R. Co., 11 N.M. 679, 72 P. 37 (1903).
[16] Mallory v. Pioneer Southwestern Stages, 54 F. 2d 559 (1931).
[17] See note 13, *supra.*
[18] Young v. St. Louis I. M. & S. Ry. Co., 227 Mo. 307, 127 S.W. 19 (1910).
[19] Cooper v. Kansas City Public Service Co., 356 Mo. 482, 202 S.W. 2d 42 (1947).
[20] *Ibid.*
[21] *Supra,* note 13.
[22] Casey v. St. Louis Transit Co., 205 Mo. 721, 103 S.W. 1146 (1907); King v. St. Louis & S. F. R. R. Co., 130 Mo. App. 368, 109 S.W. 859 (1908).
[23] *Supra,* note 6.
[24] Peters v. St. Louis & S. F. R. Co., 150 Mo. App. 721, 131 S.W. 917, 923 (1910).
[25] Brownell v. The Pacific R. R. Co., 47 Mo. 239, 243 (1879).

ONLY ONE CAUSE OF ACTION DESPITE STATUTE?

Although the Missouri decisions would seem to be conclusive on the question, it might be well to recall that the Colorado statute does appear, on its face, to create two cases of action, and that some of the language in the Colorado court's opinion in *Denver & Rio Grande R. Co. v. Frederick* lends itself to such a construction. I am inclined to conclude, however, that there is but one cause of action in our hypothetical case.

Some general statements of law have been persuasive in reaching this conclusion. For instance, in an action brought under the Colorado statute for the death of a railroad employee while engaged in interstate commerce, wherein the Supreme Court of Colorado held the action should have been brought under the appropriate federal statute, the court said, "The two statutes cover the same subject, are unlike in substantial respects, and cannot occupy the same field." [26] A statement by the Missouri court which may explain this result is as follows:[27]

> Where there are two statutes and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that, if standing alone, it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception, if not a repeal of the latter or general statute.

Similarly, a federal court has said,[28]

> Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general.

At this writing, two bills have been passed in the Colorado Legislature, Senate Bill No. 49 and House Bill No. 78. Each of these increases the maximum allowable under each section of the statute to $10,000. There is no other change is substance, except that the Senate Bill deletes the words "and not less than three thousand dollars" in the present statute, and adds the words, "deemed just and fair by a jury or court." If this wording should be construed to make the proposed act compensatory rather than penal, then the solution to our problem should be much simpler than it is under the present statutes. However, such a construction is unlikely, since, in *Denver & Rio Grande R. Co. v. Frederick*, the court listed at least three other reasons why it felt the statute is penal rather than compensatory, and there is also the fact that the proposed statute continues to use the word "forfeit". It seems, then, the enactment of either of the proposed statutes should have no effect on Mary Doe's problem, should it arise before the Supreme Court of Colorado, and she should be held to have only one cause of action for John Doe's wrongful death.

[26] Denver & Rio Grande R. Co. v. Wilson, 62 Colo. 492, 494, 163 P. 857, 859 (1917).
[27] Gilkerson v. Missouri Pac. Ry. Co., 22 Mo. 173, 121 S.W. 138, 148 (1909).
[28] U. S. v. Mammoth Oil Co., 14 F. 2d 705, 715 (1926).

# THE SUDDEN EMERGENCY DOCTRINE IN COLORADO

STANLEY H. SCHWARTZ*

The defendant was driving his automobile upon a road with which he was well-acquainted. He ascended a hill from the south, the slope on the other side being hidden from view. Although he knew travelers might be expected to be ascending the hill from the north, he passed another car at great speed shortly after commencing his descent. He failed to see the plaintiff ascending from the north upon a motor cycle, and collided with him, causing serious injury.

Under the foregoing fact situation, should plaintiff be denied relief because he was contributorily negligent in that he possibly might have escaped injury by taking the edge of the road? This question, presented in *Lebsack v. Moore*,[1] is typical of the sudden emergency cases which arise today and which must be solved by our modern tribunals. Should the plaintiff be held to the same degree of care as any participant in such an accident, or are there distinguishing circumstances which must be given special consideration and merit a different legal application?

We can quite readily see from the facts presented that the plaintiff was suddenly confronted with an unexpected imminent danger and had to make an immediate choice between alternative courses of conduct. Before continuing into a discussion of the application of this *sudden emergency doctrine*, we should first try to form some general definition of what an emergency is.

A broad definition of an emergency was followed by our Colorado Supreme Court, where it was said that an emergency is *some sudden or unexpected necessity requiring immediate or at least quick action.*[2] Another definition is: *An unforeseen occurrence of circumstances which calls for immediate action or remedy.*

Although these definitions are quite broad, they would not suffice in the presentation of an emergency instruction to the jury. In viewing the emergency doctrine in its broader scope, the following factors enter into all of the emergency cases and are briefly discussed by Dean Prosser [3] in his short analysis of the theory:

> (a) The actor who is confronted with a sudden emergency may be left no time for thought, or may be reasonably disturbed or excited, and so cannot weigh alternative courses of action.[4]
>
> (b) While he cannot weigh alternative courses of action, he must, nevertheless, make a speedy decision, which will be based very largely upon impulse or instinct.

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[1] 65 Colo. 315, 177 P. 137 (1918).

[2] First State Bank v. Becker, 78 Colo. 436, 242 P. 678 (1925).

[3] PROSSER ON TORTS, p. 242 (1941).

[4] See, Sherman v. Ross, 99 Colo. 354, 62 P. 2d 1151 (1936).

(c) The emergency must not have been created through the actor's own negligence.

There are two other elements which the cases seem to require, but which Dean Prosser does not mention. These are: Where an injury results from the choice made, and where the actor is aware of the emergency.[5]

Most writers very glibly pass over the doctrine as another application of the reasonably prudent man test and don't go into its ramifications. The practical uses of the doctrine to the lawyer practicing in the field of torts are thus seldom discussed.

From the above elements, we reach the conclusion that the practicing lawyer should look at his fact situtation to see if the doctrine is applicable before he requests an emergency instruction. Illustrative of the instructions accepted by our courts in such instances are the following:

> If one uses bad judgment in the excitement of the moment of danger, this of itself does not prove negligence, and in such cases plaintiff is only required to use ordinary care to prevent injury.[6]
>
> A party suddenly realizing that he is in danger from the negligence of another is not to be charged with contributory negligence for every error of judgment when practically instantaneous action is required.[7]

There are many other Colorado cases wherein similar instructions which include the above elments have been approved.

## Colorado Follows Majority Doctrine

From a digest of the cases, it is clearly ascertained that Colorado upholds the emergency doctrine and uses the majority elements stated. The doctrine was applied as early as 1894 in our court decisions which hold that where an instantaneous decision is demanded from a person dazed by danger, an error of judgment is not in law to be imputed to him as contributory negligence. Rather, it is for the jury to determine whether or not the conduct of one so situated amounts to contributory negligence.[8]

A summary list of the emergency cases from 1918 to 1944 is set out by Richard Hall in his new book,[9] which includes the leading cases in Colorado on the topic. Through these and numerous other cases the doctrine is firmly established in this state.

A review of these cases makes it apparent that, as is generally true in tort actions, the burden of proof rests upon the one who seeks to benefit from the emergency. It also appears that there may be special circumstances requiring a different test for

[5] Hanson v. Matas, 212 Wis. 275, 249 N.W. 505 (1933). An exceedingly deaf pedestrian on a highway had his clothing brushed by the front of a truck approaching him from behind. He turned toward it instead of jumping away from it, and in consequence he was struck by the projecting box of the truck. Held not entitled to an instruction on the emergency rule since he acted before he was aware of his danger.

[6] Colo. Midland Ry. Co. v. Robbin, 30 Colo. 449, 71 P. 371 (1902).

[7] Grunsfield v. Yetter, 100 Colo. 570, 69 P. 2d 309 (1937).

[8] Union Pacific Ry. Co. v. Kelly, 4 Colo. App. 325 (1894).

[9] Hall, Colorado Accident Law Digest (1951).

the judgment of the actor who seeks the benefit of the doctrine. For example, if by reason of special training or natural aptitude the actor has greater ability to cope with possible dangerous situations, a better judgment will be required of him. An illustration given in the *Restatement of Torts* suggests that a driver of a high speed interurban omnibus would not be reasonably competent to drive unless by constant training and practice he had become capable of almost automatic reaction to the numerous situations which are likely to arise and which, when they do arise, require prompt and proper action.[10]

The problems of whether an emergency existed and whether the actor has been reasonably prudent are usually left to the determination of a jury, with the court being very reluctant to direct a verdict in such instances. The jury is given the situation of the reasonably prudent man acting under similar circumstances.[11] In other words even in an emergency, the question of whether an automobile driver is or is not negligent must be determined by the standard of reasonableness under the particular circumstances, considering the emergency as one of the circumstances.[12] A good illustration of this rule is the action for damages to the plaintiff's horse sustained in a collision with the defendant's automobile.[13] The court held that the defendant could not complain of an instruction such as this:

> What is negligence? The law says that it is want of due care. It is what a man of ordinary prudence, under the circumstances would do. There is the question of sudden peril; something happens all at once. The law is, what would a reasonable man do under the circumstances? What would a man of reasonable prudence do? The law sets up as the ideal a man of reasonable prudence.

It was held not a valid objection to the above instruction that it in effect charged the jury that one in a position of sudden peril is held to the standard of ordinary prudence.

### Application Where Children Involved

Another application of the doctrine occurs when children are involved. It was stated in *Hunt v. Los Angeles Ry. Corporation,* in reversing a judgment for the defendant in an action for the death of a boy eleven years old, who, while riding a bicycle, was struck by a motor bus:

> Conduct which might otherwise constitute negligence on the part of a child may not be so considered where its acts or omissions were done or omitted in an emergency calculated to produce fright, bewilderment, or confusion. As has been held with respect to the conduct of adults under similar circumstances, if the negligence of the defendant causes fear and loss of presence of mind on the part of the injured person, so as to impel him to rush into danger, his

[10] Restatement on Torts, Sec. 296 (c).
[11] Denver-Los Angeles Trucking Co. v. Ward, 114 Colo. 348, 164 P. 2d 730 (1945).
[12] Dillon v. Sterling Rendering Works, 106 Colo. 407, 106 P. 2d 358 (1940).
[13] Barkshadt v. Gresham, 120 S. C. 219, 112 S. E. 923 (1922).

mere error or mistake of judgment does not necessarily constitute contributory negligence, as a matter of law.[14]

When applying the reasonably prudent rule to children, the usual analogy is that of a child of the same age under similar circumstances.

When considering the *emergency doctrine* and the *last clear chance doctrine* together I find the criteria which distinguishes them is usually the test of deliberation. In many cases both theories are presented, and a determination must be made as to whether the actor had sufficient time to weigh the factors which occurred to him at the time of the accident. Most courts advocate that when the actor had a chance to deliberate he will be entitled to an instruction on last clear chance, and an emergency instruction will not be given. The trouble with this is that most of the fact situations lend to a confusion on the point of deliberation and the question is a close one.

AN INSTRUCTION ON BOTH THEORIES?

A view which some courts have adopted is that when the evidence shows such a divergence, an instruction on each theory should be given. On many occasions both parties ask for an emergency instruction. The plaintiff wishes to avoid the implication of contributory negligence, while the defendant seeks to prove that his actions under the conditions were not negligent. A survey of the judgments shows that where an emergency case is decided we have more directed verdicts for the defendant than the plaintiff. More judgments for the plaintiff are reversed than are reversed for the defendant and the jury finds for the plaintiff much more frequently than for the defendant.[15]

In Dean Evans' study of the doctrine, he points out the cases where the actor has acted precipitately in order to avoid an immediate danger to himself. It is hard to conceive that in these cases even an instant's reflection would not have foretold danger to others. This fact of immediate personal danger is held adequate to create a privilege in the interest of self-preservation, unless the actor's conduct in coming into the emergency was blameworthy. Where personal safety is involved, one may put the immediate loss upon another, at least if that other person is unidentified at the time. So far no method has been found of weighing the advantage to him and the harm to the other by giving damages, measured either by the value of the advantage to the defendant or the harm to the plaintiff. If, however, a party by his own negligence created the emergency, he cannot have the benefit of an emergency instruction to excuse his negligence.[16]

[14] Hunt v. Los Angeles Ry. Co., 110 Cal. App. 456, 294 p. 745 (1930); Ottertail v. Duncan, 137 F. 2d 157 (CCA 8th S. D.) (1943).

[15] Evans, *The Standard of Care in Emergencies*, 31 KENTUCKY LAW JOURNAL 229 (1943).

[16] *Ibid.*

# LAST CLEAR CHANCE IN COLORADO

JOHN D. SAVIERS
*of the Denver Bar**

What does the phrase *last clear chance* mean as defined by Colorado law? If this phrase leads one to believe that there is a separate and distinct right available against a negligent person who had the last clear chance to avoid an injury, then it is a misnomer. There is not under Colorado law a separate right of recovery based on last clear chance. There is only one right of recovery available where last clear chance is involved, and that right is based on simple negligence alone. The phrase *last clear chance* comes into the picture only as a description of the facts of the case.

The Colorado courts for the last fifteen years have very pointedly shown that a person shall at all times exercise a reasonable degree of care toward others. The rule has been clearly laid down that a person may not escape liability for a negligent act created by himself where that act was a breach of a duty owing the plaintiff, and where the act was the legal proximate cause of the plaintiff's injury.

The rule as set out above may be traced through Colorado decisions starting with *Independent Lumber Co. v. Leatherwood.*[1] In this case the plaintiff stopped at a stop sign, looked to his left and saw a truck some 400 to 475 feet away. He then put his car in gear and proceeded to make a left turn on to the street toward the approaching truck. When the plaintiff had completed about one half of his turn, the defendant struck him, causing bodily injury and damage to his car. The court in holding for the plaintiff said:[2]

> Clearly plaintiff bases his right of recovery on injuries negligently inflicted on him by defendant. A failure to exercise ordinary care for another's safety which operates as the proximate cause of injury to the latter, is the legal theory on which recovery is permitted in negligence cases.

Here the court, without quibbling, pointed out that the plaintiff's right of recovery was predicated on the negligence theory alone, and that *the last clear chance rule applies for purpose of determining the legal proximate cause of the injury.* The court went on to say:[3]

> The rule of last clear chance is one to be applied for the analysis or resolution of an extended fact situation into at least two fact situations, one of which includes the acts and omissions of the plaintiff that create the condition under which an injury occurs and this

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* Written while a student at the University of Denver College of Law.
[1] 102 Colo. 460, 79 P. 2d 1052 (1938).
[2] *Supra,* note 1 at 462.
[3] *Id.* at 463.

> becomes merely a remote cause of it; the other including the acts and omissions of the parties subsequent to the creation of the situation, from which the proximate cause of the injury is to be asceertained.

The last clear chance rule is a method applied to analyze, resolve, or describe a factual situation—a method by which the acts of the plaintiff and the defendant can both be better explained. The factual situation described by the rule requires that the plaintiff must be in a position of impending peril created by his own negligence, and it is required that the defendant could or should have discovered plaintiff's position.

In the above case the plaintiff was admittedly negligent by not allowing the defendant truck driver the right of way as required by city ordinance. He did not see the truck from the time it was 400 feet away until he was hit. An analysis of plaintiff's position shows that he was in a situation of inextricable peril created by his negligent act.

The defendant admitted that he was driving approximately 25 mlies per hour, and that he had an unobstructed view ahead of him. Evidence was presented proving that the defendant had ample time once the plaintiff had pulled into the street to stop his truck and avoid the injury. The defendant, therefore, could have discovered the plaintiff's position if he had used reasonable care in keeping a proper lookout. If the reasonably prudent man test is used, it must be found that the defendant was negligent and in breach of a duty owing the plaintiff. The defendant could have foreseen that his failure to keep a proper lookout for the plaintiff, where in fact he was in the position to do so, was negligent. The defendant could have discovered the plaintiff's impending peril, and it was his independent and unbroken negligent act that was the proximate cause of the plaintiff's injury.

### Must Prove Just As Any Other Fact

In any cause of action the plaintiff bears the burden of proving the facts of the case. *Last clear chance* is a factual situation that must be proved the same as any other fact. *Dwinelle* v. *Union Pacific R.R.*,[4] brings out this point. The plaintiff in this case had been driving parallel to the railroad. His view of the tracks was obstructed by a frosted windshield and by the bed of the truck which blocked the side window of the cab. Because of plaintiff's obstructed view, he at no time saw the approaching railroad car; therefore, he had put himself in a position of inextricable peril. The defendant was driving at normal speed and had given the proper signal for highway crossings. Evidence was offered that the defendant had seen the plaintiff before he had started on to the tracks; and that he did not attempt to stop the railroad car

[4] 104 Colo. 545, 92 P. 2d 741 (1939).

until he had actually seen the defendant start on to the tracks. By that time it was too late to avoid the collision. Evidence also was presented showing that there was a split second possibility that the defendant could have avoided the injury. This evidence, however, was not sufficient to sustain plaintiff's burden of proof. The court in holding for the defendant said, "the doctrine of last clear chance applies only where plaintiff's negligence is admitted, and he (plaintiff) has the burden of proving it (i.e. last clear chance) as any other fact."

As to this particular case the court said:

> it must be admitted that if the impending peril in which the parties found themselves was due entirely to the negligence of Perry and Dwinelle (drivers of truck) and yet was discovered by Finn (driver of railroad car), or, in the exercise of reasonable care, ought to have been discovered by him in time to avert the accident, the doctrine applies and the cause should have gone to the jury as against the company.

Once the plaintiff has sustained this burden of proof, then it is the duty of the jury to consider all of the facts presented, and from these facts determine the legal proximate cause of the injury.[5] The Supreme Court in *Denver Tramway Corp.* v. *Perisho*[6] overruled the defendant's contention that the trial court erred in its instruction to the jury relative to the last clear chance rule. The defendant claimed that the rule could not be applied in this case because in fact the plaintiff's negligence was continuously active up to the time of the injury. Therefore, since the plaintiff was contributorily negligent, the last clear chance rule was not available. The court held that the rule was applicable only when the defendant and plaintiff were both negligent. And where there was evidence that both parties had been negligent, then it was proper for such facts to be presented to the jury for their consideration. Evidence of contributory negligence does not preclude the use of the last clear chance rule; instead such evidence becomes a part of the facts to be presented along with all other facts for the jury's determination.

## COLORADO FOLLOWS RESTATEMENT

The Colorado courts have found that Section 479 of the *Restatement of Torts* properly describes the last clear chance rule.[7] A quick breakdown of that section reveals that the right of recovery under the rule is based on negligence, with the limitation that the rule is not applicable unless there is a specific factual situation

[5] Denver Tramway Corp. v. Perisho, 105 Colo. 280 (1939); Lambrecht v. Archibald, 119 Colo. 356 (1949); Woods v. Siegrist, 112 Colo. 257 (1944).

[6] *Supra.*

[7] Independent Lumber Co. v. Leatherwood, *Supra,* note 1; Lambrecht v. Archibald, *Supra,* note 5; Woods v. Siegrist, *Supra,* note 5; Pueblo Transportation Co. v. Moylan, 121 Colo. ...., 1950-51 CBA Advance Sheet 184 (No. 9).

in evidence.[8] *The Restatement, therefore, is in accord with the Colorado rule. It allows recovery based on negligence alone, and it makes the use of the rule available only when a specific factual situation is present.*

The last clear chance rule in Colorado has been made simple and useful. The rule provides a means of presenting a complicated factual situation in a simple manner. We see from the Colorado decisions that the last clear chance rule is a factual situation that must be proved the same as all other facts, a factual situation that must go along with all other facts to the jury for their determination. A person seeking recovery under the rule does not have a separate and distinct cause of action; instead he has a cause of action based on negligence alone.

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# FEDERAL TORT CLAIMS ACT DIGEST

TIMOTHY WOOLSTON*

By passing the Federal Tort Claims Act [1] in 1946, the United States has, with certain exceptions to be noted later, consented to waive her immunity from suits founded in tort. To appreciate the full significance of the Tort Claims Act, an understanding of what has gone before is essential.

Prior to 1887, the private relief bills presented to Congress were the sole means by which a person could satisfy a tort claim against the United States. The time consuming work resulting from the consideration of all of these private bills finally prompted Congress to pass the Tucker Act [2] in 1887. The Tucker Act was directed at this congestion in Congress and it did alleviate some of the distress by extending the jurisdiction of the district courts to include claims for less than $10,000 where such claims were founded upon the Constitution, a Federal statute, an executive regulation, or a contract to which the United States was a party. Because ordinarily, simple tortious conduct is infrequently based upon a statute or regulation, the Tucker Act did nothing to rid Congress of the hundreds of claims that were based upon the simple torts of government agents.

[8] Section 479 *Restatement of Torts:* A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm, (a) the defendant (i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or (ii) knows of the plaintiff's situation and had reason to realize the peril involved therein; or (iii) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise . . .

* Student, University of Denver College of Law.

[1] 62 Stat. 992, 28 U.S.C. secs. 1346 (b), 1402 (b), 2401 (b), 2402, 2411, 2412 (b), 2671-2680 (1950). All section references are to Title 28 U.S.C. unless otherwise indicated.

[2] Sec. 1346 (a) (2).

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[2] Sec. 1346 (a) (2).

In 1920, the Suits in Admiralty Act[3] was passed. This Act extended the jurisdiction of the district courts to cover merchant ships that were either owned or operated by the government where such ships caused money damages to private persons or corporations. This Act did relieve Congress of those torts connected with admiralty.

The Public Vessels act[4] of 1925 extended the jurisdiction of the district courts to include the public vessels of the United States.

The greatest waiver of governmental immunity from suit came with the passage of the Federal Tort Claims Act in 1946. That the passage of this Act was also prompted by a congressional desire to be rid of the private relief bills can be realized from the fact that the Tort Claims Act came into being as a part of the general plan of Congress to streamline its own procedure by enactment of the Legislative Reorganization Act.[5]

LIBERAL ACT SHOULD BE INTERPRETED LIBERALLY

The Tort Claims Act is one of the most progressive pieces of legislation ever to have come out of Congress. That a liberal attitude should accompany the interpretation of the Act may be seen from the following language in *United States v. Aetna Casualty and Surety Co.*[6]:

> In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity should be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Construction Co.*, 243 N. Y. 140, 153 N. E. 28, "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

While construction of the Act has been toward a direct waiver of sovereign immunity, the Act itself merely extends the jurisdiction of the district courts to include:[7]

> Civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

In substance, the Act[8] provides for venue, appeals, trial without jury, interest, time for commencing actions, definition of terms,

[3] 46 U.S.C. sec. 742 (1949).
[4] 46 U.S.C. sec. 781 (1949).
[5] 60 Stat. 812 c. 753 (1946). The Tort Claims Act is Title IV of this Reorganization Act.
[6] 70 S. Ct. 207, 216 (1949). ACCORD: Niagara Fire Ins. Co. v. United States, 167 F. Supp. 850, 856 (S.D.N.Y. 1948).
[7] Sec. 1346 (b).
[8] *Supra*, note 1.

administrative agency settlement of claims for less than $1,000, withdrawal of claims from administrative determination, barring of further action against the employee, compromise of a claim, attorney's fees, applicability of the Federal Rules of Civil Procedure, and the twelve exceptions from coverage by the Act.

SERVICE-CONNECTED CLAIMS

While the terms of the Act are quite broad, thus far the courts have not been willing to grant a cause of action to military personnel where the injuries complained of were service-connected.[9] The Supreme Court has said that there is merit in an action by members of the armed forces, but that no recovery exists. In the very recent case of *Feres v. United States*,[10] the Supreme Court said that the relationship of the Government to its military personnel was distinctively "federal in character" and continued:

> No federal law recognizes a recovery such as claimants seek. The Military Claims Act, 31, U. S. C. sec. 223 (b) (now superseded by 28 U. S. C. sec. 2672), permitted recovery in some circumstances, but it specifically excluded claims of military personnel "incident to their service."
>
> This court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain and uniform compensation for injuries or death of those in armed services . . . If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

The deceased in the *Feres Case* died as a result of a barracks fire on an army post when he was on active duty as a member of the United States Army. An interesting decision would no doubt result if the recently decided case of *Wham v. United States*[11] were analogously asserted on the prior compensation argument. In the *Wham* case, a District of Columbia policeman was negligently injured by an employee of the Treasury Department. In allowing the cause of action, the court said that the receipt of benefits from the policemen and firemen's funds was no bar to the action notwithstanding the fact that such funds were augmented by federal money. The court also said that no election of remedies is necessary under the Federal Tort Claims Act. Again, in *Bandy v. United States*,[12] a veteran receiving benefits from the Veterans' Administration while in a veteran's hospital was not precluded from suing under the Act when the agents of the hospital injured him through their negligent acts.

[9] Feres v. United States, Jefferson v. United States, and Griggs v. United States, 340 U. S. 135 (Single opinion for all cases).
[10] 340 U. S. 135 (1950).
[11] 180 F. 2d 38 (D.C.D.C. 1950).
[12] 92 F. Supp. 360 (D.C. Nev. 1950).

The courts have found no difficulty at all in allowing actions and recovery in the cases of non service-connected injuries where the claimants have been military personnel.[13] At present the leading case on this point is the recently decided *Brooks v. United States,*[14] in which the claimants were soldiers on leave. They were riding in their private automobile and were struck by an army truck driven by soldiers who were acting in line of military duty at the time of the accident. The court said that while the relationship of the government to its military personnel was "federal in character", a different relationship exists when such persons are on authorized leave. Perhaps the learned court has overlooked the fact that military personnel while on authorized leave are still subject to federal law and the military regulations of the district in which they are located.

PROCEDURAL ASPECTS OF THE ACT

In any new legislation by which the sovereign abdicates inherent power, certain procedural difficulties necessarily arise. In the Tort Claims Act itself and in the cases construing the Act, it is apparent that the Federal Rules of Civil Procedure apply to the Act.[15] The difficulty is in determining to what extent and under what circumstances they do apply. In *Howey v. United States,*[16] the claimants were injured when the taxicab in which they were riding collided with a mail truck of the government. In the suit against the taxicab company, the defendant company asserted the negligence of the postal department employee who was driving the truck and sought to join the United States as a third party defendant. In allowing the joinder, the court explained that since the substantive law of Pennsylvania allowed a joinder of joint tort feasors prior to judgment, such local law controlled in accordance with the provisoins of 28 U.S.C. sec. 1346 (b). In *Capital Transit Co. v. United States,*[17] the claimants were similarly situated but the court denied the joinder, saying in part that the Act refers only to substantive laws of torts, not to all the incidents of litigation such as the joinder of parties and further, that the purpose of the Act was to provide convenient administration and judicial remedies for torts committed by government agents and to relieve congressional committees of the overburdening work of considering special bills for relief. Thus it would appear that there is now a split of decisions on the matter of joinder of or with the United States. It might be well to note that the specific language of the Act provides that the liability of the government shall be determined " . . . under circumstances where the United States, *if a*

[13] Brooks v. United States, 337 U. S. 49 (1950).
[14] 337 U. S. 49 (1950).
[15] Sec. 1402 (b) ; F. G. Ryal v. United States, 184 F. 2d 616 (7th Cir. 1950), Evans v. United States, 10 F.R.D. 255 (1950), Brauner v. United States, 10 F.R.D. 468 (1950).
[16] 181 F. 2d 967 (3rd Cir. 1950).
[17] 183 F. 2d 825 (C.A.D.C. 1950), Certiorari granted 71 S. Ct. 61.

*private person, would be liable . . .*"[18] (Italics supplied.)

To come within the coverage of the Act, the claimant must affirmatively plead the specific provisions of the Act as outlined in 28 U.S.C. sec. 1346 (b). This pleading aspect is important because the jurisdiction of the Federal courts will not be presumed and proper pleading demands that such jurisdiction be asserted. Thus, there can be only one remedy and if it appears that the Suits in Admiralty Act or the Tucker Act provide remedies, the jurisdictional question must be answered by resort to the particular act involved. In *Aktiebolaget Bofors v. United States*,[19] a suit was instituted under the Tort Claims Act for damages in the sum of $2,000,000 for the alleged illegal use of a secret process. The claimant licensed the United States to produce the Bofors naval cannon for "United States' use". The government then made the weapon and equipped the other Allies with it. The court denied the cause of action under the Tort Claims Act because the action sounded in contract, not tort and the Tucker Act is controlling in cases in which the government is a party to a contract. The court also noted that, where the action is based upon a contract and the amount is in excess of $10,000, the Court of Claims alone has jurisdiction.

The time period for bringing an action under the Act has been designated to be no later than one year after August 2, 1946, or one year after the cause arises, whichever is later.[20] In *Young v. United States*,[21] a cause of action arose in the District of Columbia where there is a one year statute of limitations for tort actions. The cause of action was older than one year, but not barred by the Tort Claims Act. The court allowed the suit on the ground that a federally created right cannot be barred by a local statute where the federal statute has its own period of limitations. It follows that where a local statute grants a greater period for bringing a tort action than that provided in the Act, the federal statute will control if the action is begun under the Tort Claims Act. Also, a local revival statute will not have the effect of reviving a cause of action that has expired under the Act's provisions.

## The Agency Question

To show the liability of the government, the negligent or wrongful conduct of the government's employee must have occurred while the employee was acting "within the scope of his office or employment".[22] Such employee is defined:[23]

> Officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or per-

[18] Sec. 2672.
[19] 91 F. Supp. 131 (D.C.D.C. 1950).
[20] Conner v. United States, 93 F. Supp. 681 (D.C.E.D. Penna. 1950).
[21] 184 F. 2d 587 (C.A.D.C. 1950).
[22] Sec. 1346 (b); Cannon v. United States, 84 F. Supp. 820 (D.C. Calif. 1949).
[23] Sec. 2671.

> manently in the service of the United States, whether with or without compensation.

The usual rules of the law of agency are determinative of the capacity. Thus, the government was not liable when an employee of the Alaska Railroad, a governmental corporation, was on a frolic of his own when he was injured by a speeder belonging to the railroad.[24] Members of the armed forces are within the scope of their employment when they are acting in line of duty.[25] In the recent case of *United States v. Fotopulos*,[26] a civilian was injured when the automobile in which he was waiting for a red traffic light to change was smashed into by an army truck driven by a soldier who was on an official errand. The court said that the soldier was acting in line of duty and the government must respond in damages for his act. Where the act of the agent is both personal and official, the court employed this language as controlling of its policy:[27]

> Where a servant is attending to both his own and his master's business at the same time, no nice inquiry will be made as to which business the servant is actually engaged in, . . . but the master will be held responsible, unless the servant clearly could not have been directly or indirectly serving the master.

In *Christian v. United States*,[28] the United States Army furnished a truck and soldier-driver to take some persons into a nearby town. While in town and after having deposited the passengers, the soldier visited several bars and became disorderly. A deputy sheriff who was attempting to arrest the soldier was killed by him. The court said that the soldier had completely deviated from his employment and the government was not liable for his acts.

EXCEPTIONS UNDER THE ACT

There are twelve exceptions from the Tort Claims Act.[29] There has been litigation in very few of the excepted fields. Perhaps the most important exclusion is that dealing with discretionary actions.[30] The Act provides:[31]

> Any claim based upon an act or omission of any employee of the Government exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

It is clear that the reasoning behind the exceptions is that the sovereign may stipulate any conditions he sees fit when he is allowing

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[24] Tucker v. United States, 91 F. Supp. 527 (D.C. Alaska 1950).
[25] Sec. 2671.
[26] 180 F. 2d 631 (9th Cir. 1950).
[27] United States v. Johnson, 181 F. 2d 577 (9th Cir. 1950).
[28] 184 F. 2d 523 (6th Cir. 1950).
[29] Sec. 2680.
[30] Costley v. United States, 181 F. 2d 723 (5th Cir. 1950), Coates v. United States, 181 F. 2d 816 (8th Cir. 1950), Olson v. United States, 93 F. Supp. 150 (D.C. N.D. 1950).
[31] Sec. 2680 (a).

suit to be brought against him, and the prerequisite to bringing the suit is conformance with the stipulated conditions. This may be readily analogized from the language in a case defending the position of trial without a jury in actions under the Act.[32] The cases construing the *"discretionary clause"* follow the general rules for determining whether a function is discretionary or ministerial. In *Coates v. United States*,[33] a farm was damaged when the course of the Missouri River was changed incident to the reclamation of arid lands. The reclamation work was said to be discretionary because of the wide scope and general policy of the project. In *Olson v. United States*,[34] suit was commenced under the Act for damages arising from injury to livestock and realty when a flood gate was opened at a time when the regular course of the river was blocked by ice and snow. The court denied a cause of action because the complaint fell within the "discretionary function" exception of the Act. On the other hand, in *Costley v. United States*,[35] the wife of a master sergeant was admitted to the maternity ward of an army hospital and while a patient there, she was given a harmful substance instead of a spinal anasthesia. As a result of the harmful injection, she was permanently paralyzed. The court held the government liable, saying that the discretion of the agents is at an end once they admit the patient and from that time forward, they owe a duty of due care, diligence and skill.

Generally, the other exceptions are those claims which arise from loss, miscarriage or negligent transmission of postal matter, an act of tax assessment or customs, matters covered by the Admiralty Act, an act or failure of an agent in administering secs. 1-31 of Title 50, appendix, fiscal operation of the treasury or regulation of the monetary system, establishment of a quarantine by the United States, the operation of a vessel in the Canal Zone,[36] a willful tortious act, combatant activities of the military during time of war, a tort committed in a foreign country, and the operation of T. V. A.

## DAMAGES

Unless the local law limits the amount of damages recoverable in any particular action, there is no limitation upon the amount of recovery for suits instituted under the Federal Tort Claims Act.[37] The Act has not abrogated the necessity for a congressional appropriation before the amount of the award is paid to the successful claimant.

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[32] Uarte v. United States, 7 F.R.D. 705 (D.C. Calif. 1948).
[33] Note 30, *supra*.
[34] Note 30, *supra*.
[35] Note 30, *supra*.
[36] Sec. 2680 (g). Repealed Sept. 26, 1950 64 Stat. 1043, c. 1049, sec. 13 (5).
[37] Secs. 2672, 2674, Wham v. United States, 180 F. 2d 38 (D.C.D.C. 1950).
NOTE: For an excellent analysis of the Act, see Yankwich, Judge Leon R., *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143 (1949).

# INQUIRIES PERMITTED RE INSURANCE COMPANIES ON VOIR DIRE

JOHN W. LOW
*of the Denver Bar**

"Are you a stockholder, director, employee, policyholder, or *in any manner interested,* in *any insurance company* issuing policies for protection against liability for damages for injuries to persons or property?" As a defense attorney, would you object to this question if it were propounded in a negligence case by counsel for plaintiff on voir dire examination in Colorado?

Although evidence that the defendant is insured against liability is inadmissible because it is irrelevant and prejudicial, most jurisdictions permit a question in one form or another to be put to jurymen on their voir dire examination.[1] The exact form of the question varies jurisdiction by jurisdiction, trial by trial. Nevertheless, the commonly used interrogation can be classified into two groups: One group includes the questions which name the insurance company, frequently called the specific or narrow question; the other is illustrated by the question stated above. This is known as the broad or general interrogation. On numerous occasions the Supreme Court of Colorado has approved the use of the specific question.[2] Little, if anything, has been said about the propriety of the general query. Because of this and the divergent views expressed in other jurisdictions, we are confronted with these issues: Should counsel on voir dire examination be permitted to ask the jury if any of them have any interest in *any* insurance company? If so, do the Colorado cases prohibit the use of the broad question?

The answer to the first should be in the affirmative. It is fundamental that every litigant is entitled to a trial before a fair and impartial jury. To attain this end counsel is entitled as a matter of right to challenge for cause where the relationship or pecuniary interest is not substantially remote. Even if such interest will not operate to disqualify for cause, counsel may desire to make it a basis for peremptory challenge. In order to exercise intelligently these rights he must be given considerable latitude in the selection of a jury. And only by permitting the broad question can the plaintiff be assured that the jury is disinterested.

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* Written while a student at the University of Denver College of Law.

[1] See cases collected in 56 A.L.R. 1456 and 104 A.L.R. 1067.

[2] The Vindicator Consolidated Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 P. 313 (1906); Cripple Creek Mining Co. v. Brabant, 37 Colo. 431, 87 P. 796 (1906); Independence Coffee & Spice Co. v. Kalkman, 61 Colo. 98, 156 P. 135 (1916); Tatarsky v. Smith, 78 Colo. 491, 242 P. 971 (1926); Bolles v. Kinton, 83 Colo. 147, 226 P. 26 (1928); Rains v. Rains, 97 Colo. 19, 42 P. 2d 740 (1935); Johns v. Shinall, 103 Colo. 381, 86 P. 2d 605 (1939).

Where the interrogation is limited to a named insurance company, the possible bias, interest, or prejudice of a juryman is not disclosed. The very nature of his employment, past or present, may create in his mind a prejudice in favor of the defendant. This can best be shown by a hypothetical illustration.

One of the prospective jurors might be an officer, agent or employee of an insurance company other than the one involved in the case, which we assume to be a negligence action based upon an automobile collision. Such a juror would be the first to suspect that an insurance company was involved, and it is not unrealistic to presume that he would lean toward the field of business that gives him his livelihood. Even if he believed that no indemnity company was interested in the outcome, his profession would make him defensive minded. A major stockholder in "another" insurance company, or people more or less indirectly associated with the insurance field might be anything but impartial jurymen. Yet, the specific question would not disclose their state of mind nor develop their possible interests and prejudices.

This conclusion is sustained by an Arkansas case[3] in which counsel asked both the narrow and broad question. Defendant then offered to show that "none of this jury is connected with the general agency or any local agency," and that none of the jurors had any interest in the company as stockholders. The questions were propounded over defendant's objections and exceptions. The court in allowing the questions said:

> The jurors or some of them might have had some relationship or connection with the particular company mentioned or some other surety company so as to make them undesirable jurors, and still not have been connected with any agency or held any stock in the particular company.

Such factors as employment or relationship probably would not warrant a challenge for cause, but they would aid counsel in the wise and intelligent exercise of his peremptory challenge.

## Use of the General Question

In many jurisdictions counsel is permitted to use the general question in examining the jurors on their voir dire.[4] One court has stated that:[5]

> The great weight of authority and the better reasoning alike sanction the view that counsel for plaintiff is entitled in good faith to inquire whether any juror is interested in or connected with any insurance or casualty company that may be interested in the case as an insurer of the defendant's liability.

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[3] Halbrook v. Williams, 185 Ark. 885, 50 S. W. 2d 243 (1932).
[4] Arkansas, California, Idaho, Indiana, Iowa, Michigan, New York (by statute), Ohio, and Wyoming.
[5] Eagan v. O'Malley, 45 Wyo. 505, 21 P. 2d 821 (1933).

An Iowa court, in holding that it was permissible to ask the broad question, pointed out that 27 states have sustained plaintiff's right to propound an inquiry "such as was propounded in the instant case."[6] This figure may be an overstatement of approval, for many courts in analyzing the propriety of insurance questions on voir dire examination have failed to consider accurately the scope of permissive questions. All too frequently the support for one form of question is found in cases that deal with the other type of inquiry. Nevertheless, the general question has been approved on numerous occasions.[7] In at least one instance where counsel objected to the general insurance interrogation for the reason that it did not relate to any specific insurance company, it has been held that the trial court was correct in overruling the objection.[8] In Colorado the door has been left open and, as we shall see, the cases do not prohibit the use of the general question.

## THE SPECIFIC QUESTION PERMITTED IN COLORADO

One of the earliest Colorado cases to consider the propriety of insurance questions on voir dire examination was *The Vindicator Consolidated Gold Mining Company v. Firstbrook.*[9] Here plaintiff's interrogation named the insurance company. The trial court permitted the question over the defendant's objection. In sustaining this action, the Supreme Court said:

> . . . but where in this instance, the inquiry of the jurors was limited to their interest in the insurance company named, and nothing more, it was not error to allow such inquiry. *Union Pacific Railroad Co. v. Jones,* 21 Colo. 341; *Swift & Co. v. Platte,* 72 P. (Kan.) 271.

On the surface it might appear that the court was limiting the scope of the question to a named insurance company, but the Kansas case cited as authority indicates that the court's intention was merely to prevent the use of questions which would disclose to the jury that an insurance company was involved.

In the next two cases to consider the insurance question,[10] counsel objected to the interrogations, which named the insurance companies, on the ground that they constituted prejudicial error. The right to ask the questions was sustained, the court saying in the *Independence* case:[11]

> It must be remembered that these questions were submitted on the jurors' voir dire during which considerable latitude must, of

[6] Rains v. Wilson, 213 Iowa 1251, 239 N. W. 36 (1931).

[7] Halbrook v. Williams, *supra,* note 3; Shaddy v. Daley, 50 Idaho 536, 76 P. 2d 279 (1938); Ft. Wayne Checker Cab Co. v. Davis. 90 Ind. App. 30, 165 N. E. 764 (1929); Rains v. Wilson, supra, note 6; Tissue v. Durin, 216 Iowa 709, 246 N. W. 806 (1933); Dowd-Feder, Inc. v. Truesdell, 130 Ohio St. 530, 200 N. E. 762 (1936); Eagan v. O'Malley, *supra,* note 5.

[8] Swanson v. Slagal, 212 Ind. 394, 8 N. E. 2d 993 (1937).

[9] 36 Colo. 498, 86 P. 313 (1906).

[10] Cripple Creek Mining Co. v. Brabant, *supra,* note 2; Independence Coffee & Spice Co. v. Kalkman, *supra,* note 2.

[11] *Ibid.*

> necessity, be allowed for the purpose of exercising peremptory challenges.

Both cases cited the *Vindicator*[12] opinion as authority for the stated ruling. It should be noted that in none of these cases was the court called to rule squarely upon the permissive scope of insurance inquiries; in each instance it merely approved the question asked.

*Tatarsky v. Smith*[13] adds little to our quest. It sustained the right to ask the specific question, holding that such an inquiry did not necessarily convey to the jury the fact that an insurance company was involved in the litigation. As a matter of dictum, the court stated that counsel could ask such questions as he propounded even though he had been supplied with names, addresses, ages, occupations, and residences of each man in the box.

In 1928 the court again considered the insurance question.[14] The case does not clearly indicate whether this issue was assigned as error, but the court said:

> The plaintiff's counsel was permitted to ask the jury on voir dire whether any of them were interested in a certain insurance company. This was proper. The plaintiff had a right to ascertain the fact as to their interest. True, counsel may have had a desire to let the jury know that the defendants carried liability insurance, but we do not see how he or the Court could have treated the matter more fairly. All argument was in chambers and the court restricted the examination on this point to the one simple question. (citing the four Colorado cases that we have just considered).

Note that court does not say that the inquiry should be limited to this one question, nor does it indicate to what extent one may go beyond this question.

## Authority For Use of General Query?

*Rains v. Rains*[15] is frequently cited as authority for the proposition that the insurance query may be put to the jury on their voir dire examination. Here counsel not only asked the specific question, but also whether the jury knew of companies that indemnify against accidents, and stated that the Globe Indemnity Company engaged in that kind of business. It was argued that the jury was advised by these questions that an insurance company was involved in the defense and that the court's refusal to grant a mistrial was error. After pointing out that the objections to the interrogations were not made in time and that the defendant had waived the right to have a mistrial declared, the court said that even if the questions were improper, "the permissible question conveyed, by necessary inference, to every intelligent juror the in-

[12] Vindicator Consolidatel Gold Mining Co. v. Firstbrook, *supra*, note 2.
[13] *Supra*, note 2.
[14] Bolles v. Kinton, *supra*, note 2.
[15] *Supra*, note 2.

formation conveyed by the questions objected to." Once again, then, the problem of scope was not answered.

In the first of the two most recent cases to discuss the propriety of insurance questions on the voir dire examination,[16] the alleged error was an unsolicited statement by a witness that an insurance agent had paid him a visit. Because the insurance element had not been injected intentionally, the court ruled that it was to be treated as evidence ordinarily inadmissible. Thus, there was no reversible error. The *dicta* in the case, however, is worth noting:

> It is permissable to interrogate prospective jurors, some of whom may be selected to serve in the case, as to their connection with or interest in insurance companies, and we have held that questions touching this matter may be asked of every prospective juror.
>
> It is permissible, and rightly so, that each of twelve prospective jurors in a case be asked on voir dire examination whether he is a stockholder, agent, or employee of an insurance company.

Read alone, these statements do not appear to be as narrow as some of those found in the earlier cases. The terms "certain" and "named" insurance companies are notably absent, and in the first paragraph reference to insurance companies is in the plural. While little weight can or should be given to these remarks, they may be significant in view of the latest case to come before the court.

GENERAL QUERY PERMITTED IN MALPRACTICE SUIT

*Edwards v. Quakenbush*[17] was decided in 1944. It was an action against a physician and surgeon for damages allegedly resulting from his negligence in performing a surgical operation. In the course of the voir dire examination counsel for plaintiff asked: "Have any of you gentlemen ever been an officer or employee of a company that insures against malpractice?" A motion for mistrial was interposed, and overruled. Error was specified to this ruling. Counsel conceded that it was not error to ask the insurance question where it named the company, but it is argued that the right to so inquire does not permit asking a blanket question concerning all insurance companies. The court held:

> Whatever may be the proper procedure hypothetically, we are satisfied that in the instant case the court committed no error in the ruling made because of the circumstances developed in the hearing in chambers.

Counsel for plaintiff had asked defendant in chambers for the name of the company involved. He was denied any information, and the court allowed the general question to stand upon the express basis that "Certainly if he (plaintiff's counsel) does not know the name of the company and cannot find it out, he is entitled to ask the general question." Although this case does not expressly hold

[16] Johns v. Shinall, *supra*, note 2.
[17] 112 Colo. 337, 149 P. 2d 809 (1944).

that the general question may be asked, it certainly opens the door in that direction. The court seemed to be careful not to limit the inquiry to a named insurance company.

It was deemed important to consider in some detail all of the Colorado cases[18] for two reasons: One, so that the reader might see the trend of the language used by the court, i.e., the fact that it is less rigid in the recent cases; two, so that it could be shown that at no time has the court ruled squarely on the permissive scope of insurance questions—at no time has it declared that the interrogation must be limited to one which names the insurance company.

Concluding that the use of the general question is necessary in order to obtain for the plaintiff a disinterested jury and that such an inquiry is not prohibited in Colorado, we then raise one more question: Should the general interrogation be used exclusively?

THE GENERAL QUESTION FAIRER FOR BOTH PARTIES

The defendant, like the plaintiff, is also entitled to an impartial jury. It is generally conceded that whenever jurors know that an insurance company will have to pay, such knowledge will usually be reflected in a larger recovery and sometimes in a verdict not consistent with the evidence. Thus, the defendant has a right to insist that matters of insurance be kept from the jury. Even though this may be difficult to do, it does not justify the court in permitting questions which admittedly inform the jury that an insurance company is interested in the outcome. In the *Rains* case[19] the court stated:

> A question put to a prospective juror as to whether he has any interest in or connection with a certain indemnity company would convey to the mind of every intelligent juror the knowledge that an indemnity company was interested financially in the outcome of the litigation. . . .

Where a specific insurance company is named in the inquiry, a jury will more readily get the impression that an insurance organization is behind the defendant than when counsel used the general interrogation. As one Justice so aptly said in referring to a juryman, "He doesn't require a brick house to fall on him to give him an idea."[20] Because of its very nature. the general question makes the insurance issue less noticeable to the jury. At least one court has stated that it would be better not to name the company.[21]

Another jurisdiction has adopted the rule that the specific

[18] Potts v. Bird, 93 Colo. 547, 27 P. 2d 745 (1933), and Phelps v. Loustalet, 91 Colo. 350, 14 P. 2d 1011 (1932) also discuss some incidental aspects of the insurance question.

[19] Rains v. Rains, *supra*, note 2.

[20] Connelly v. Nolte, 237 Iowa 114, 21 N. W. 2d 311 (1946).

[21] Harker v. Bushouse, 254 Mich. 187, 236 N. W. 222 (1931).

question may be asked only if there has been an affirmative answer to the general interrogation.[22] This may be the answer to the problem of the permissive scope of insurance questions. Certainly, the narrow question is not justified where the jurymen answer a general inquiry in the negative.

Almost from the beginning the court has said that the matter of examination on voir dire is largely in the discretion of the trial court.[23] This is the rule in most jurisdictions. But the time has come in Colorado for the Supreme Court to consider thoroughly the advisability of the practices permitted by the trial courts in regard to the insurance inquiries. A ruling prohibiting the specific question or limiting it as in the answer suggested above, would go far to assure for both the plaintiff and the defendant a fair and impartial trial.

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## OIL AND GAS LAW SUBJECT OF ANNUAL LAW DAY EXERCISES

The annual Law Day exercises at the University of Colorado this year will be devoted to a two-day conference on oil and gas law on Friday and Saturday, May 4 and 5, at Boulder.

Dean Edward C. King and his able assistants have assembled their usual fine array of talent to discuss a field of law which is still new to Colorado. The following is a summary of the program:

*Friday, May 4*

9:00 a.m.—Registration at the law school.

10:00 a.m.—Convocation on "The Oil and Gas Industry" by Ernest O. Thompson, Chairman of the Texas Railway Commission.

11:00 a.m.—A panel discussion on "Taxation of Oil and Gas Interests," with John H. Tippit giving a paper on "Ad Valorem Taxes," and Floyd K. Haskell delivering a paper on "Income Taxes." President Robert L. Stearns will preside at the morning session.

After a luncheon recess, a panel discussion will be held on "Unitization and Conservation Techniques."

The participants will be James D. Voorhees, attorney with the Continental Oil, speaking on "The Mechanics of Unitization," Robert Hardwicke, attorney of Fort Worth, Texas, speaking on "Voluntary and Compulsory State Unitization Statutes," and Warwick M. Downing, Denver attorney and Colorado representative to the Interstate Oil Compact Commission on "The Interstate Oil Compact as an Impetus to a Sound Conservation Policy."

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[22] Dowd-Feder v. Truesdell, *supra*, note 7.
[23] Union Pacific R. R. Co. v. Jones, 21 Colo. 341 (1895).

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Edward G. Knowles, president of the Colorado Bar Association, will preside.

Following the afternoon discussions, there will be a banquet at Blanchard's Lodge for all participants. Varsity Nights, the annual C. U. Days presentation, will be staged Friday evening.

*Saturday, May 5*

This is the Law Day proper and is also C. U. Days, with all the social and recreational activities that traditionally accompany the two events.

9:00 a.m.—Registration at law school.

10:00 a.m.—C. U. Days parade.

10:30 a.m.—Panel discussion on "The Oil and Gas Lease." Participants will be T. Murray Robinson, Oklahoma City oil and gas attorney, on the subject, "What an Oil and Gas Lease Should Contain," and Frederic L. Kirgis, Denver attorney, on "Leasing Public Lands." Dean Edward C. King, of the Law School, will preside.

The annual student bar luncheon will be held in the Student Union Building, with Philip Dufford, president of the Student Bar Association, serving as toastmaster. H. P. Macauley, independent lease broker, Denver, will speak.

The afternoon will be devoted to recreation consisting of golf, tennis, or attendance at the Nebraska-Colorado baseball game. The ladies in attendance are invited to the home of Mrs. Edward C. King for the traditional tea at 3:00 p.m. This will be followed by the Law Day banquet at Wayne's Cafe at 6:30 p.m. Governor Barrett of Wyoming will deliver the principal speech. John Mackie, president of the Boulder County Bar Association, will be toastmaster. Senior law students will again be the guests of the Boulder County Bar Association at this banquet. Announcements of the new members of the Order of the Coif will be made and prizes will be presented to the winners of the law school appellate brief competition.

## THE LEGISLATIVE BOX SCORE

When the 38th General Assembly adjourned on March 21, the bar association found that they had chalked up a batting average of something over .500 as regards the various measures which they had submitted for the consideration of the legislators. The Governor had not yet had an opportunity to sign any of these bar-sponsored bills as this issue of *Dicta* went to press, but by the time the May issue appears he will have acted. It is hoped to devote the major portion of that issue to a detailed account of some of the more important enactments.

Meanwhile *passing* notice may be taken of the following. The most surprising success, in view of the powerful opposition of the holders of the copyright on '35 CSA, was passage of H.B. 201,

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which provides for a statutory revision committee and a state revisor of statutes to prepare a recodification of the statutes of Colorado for submission to the 1953 General Assembly.

The bill was adopted largely in the same form as submitted by the Statutes Publication committee,[1] except for the addition of an appropriation of $25,000 to get the project underway and a section providing for the surcharge of $1 on plaintiffs' docket fees to reimburse the state for the moneys thus expended. Legislative enactment of H.B. 201 against such strong opposition was accomplished only because of the indefatigable work of Representative Louis I. Hart of Denver, ably supported by Senators Carlson, Gobble, and Henry, and Representatives Wade, Viggo Johnson, and Sayre.

THE JUDICIARY COMMITTEE'S PROGRAM

The Judiciary Commmittee was successful in gaining acceptance of its several measures pertaining to salary increases for judges, but did not get a favorable reception for its judicial department and county court reform bills. House Concurrent Resolution No. 1 was passed providing for the submission of a constitutional amendment to the people in the general election of 1952 which would permit the increase or decrease of judicial salaries during term of office and provide for the disability retirement of judges.

The judges' salary bill, S. B. 225, which was adopted did not grant as great an increase as the committee had recommended, but it did raise the salaries of Supreme Court justices to $8,500, of District, Juvenile and Denver County court judges to $7,500, and of other county judges proportionally as follows: Class II, Group A—$6,500, Group B—$5,000; Class III, Group A—$4,000, Group B—$3,500; Class IV, Group A—$2,750, Group B—$2,500; Class V—$2,000; Class VI, Group A—$1,700, Group B—$600, and Group C—$400.

Another bill which survived the legislative process was S.B. 296, providing for the reimbursement of judges for actual expenses incurred by reason of service outside their own counties.

The Denver Bar Association Legislative committee was successful in securing adoption of a large number of non-controversial bills correcting and clarifying certain areas of substantive law. Greatest defeat for the Denver Bar Association came when the bill to create two additional judgeships in the Second Judicial District became enmeshed in a political patronage fight, and died in the Senate for want of a constitutional majority.

The Patent Section of the Colorado Bas Association was successful in procuring passage of a new trade mark registration law, S.B. 323. The implications of this new law for the general practitioner will be discussed in the May issue.

[1] 28 DICTA 78 (Feb. 1951).